

# EXHIBIT 2

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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

NETLIST INC. a Delaware  
corporation,  
  
Plaintiff,  
  
vs.  
  
SAMSUNG ELECTRONICS CO.,  
LTD., a Korean corporation,  
  
Defendant.

CASE NO. 8:20-cv-00993-MCS-ADS

**DEFENDANT SAMSUNG'S NOTICE OF  
MOTION AND MOTION FOR  
JUDGMENT AS A MATTER OF LAW  
PURSUANT TO FED. R. CIV. P. 50(B)  
OR, IN THE ALTERNATIVE, NEW  
TRIAL PURSUANT TO FED. R. CIV. P.  
59; MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF**

[[Proposed] Order and Declaration of Amy R.  
Lucas Filed Concurrently Herewith]

Date: August 26, 2024  
Time: 9:00 am  
Location: Courtroom 7C  
Judge: Hon. Mark C. Scarsi

**PUBLIC VERSION - REDACTED**

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on August 26, 2024, at 9:00 am, in  
3 Courtroom 7C of the above-captioned court, located at 350 W. 1st Street, Los  
4 Angeles, California 90012, Defendant Samsung Electronics Co., Ltd. (“Samsung”)  
5 will, and hereby does, move the Court, pursuant to Rule 50(b) of the Federal Rules  
6 of Civil Procedure, to enter judgment as a matter of law in favor of Samsung and  
7 against Plaintiff Netlist Inc. (“Netlist”). In the alternative, Samsung will, and hereby  
8 does, move the Court, pursuant to Rules 50(b)(2) and 59 of the Federal Rules of  
9 Civil Procedure, for a new trial.

10 Samsung’s motion for judgment as a matter of law is made on the grounds  
11 that no reasonable juror could have concluded that the parties intended Netlist’s  
12 construction of Section 6.2 of the Joint Development and License Agreement  
13 (“JDLA”) when they entered into the contract. That conclusion follows from the  
14 overwhelming evidence supporting Samsung’s construction, including the  
15 negotiation history, Netlist’s contemporaneous statements, the course of conduct of  
16 the parties, and the commercial reasonableness of the proposed constructions.  
17 These grounds were raised in Samsung’s oral motion for judgment as a matter of  
18 law pursuant to Federal Rule of Civil Procedure 50(a).

19 Samsung’s motion for new trial is made on the grounds that the jury’s verdict  
20 was contrary to the clear weight of the evidence, the Court made a number of related  
21 prejudicial instructional errors that improperly permitted the jury to find for Netlist  
22 based on the language of Section 6.2 in isolation, and at least one of the empaneled  
23 jurors made serious false representations during *voir dire*.

24 This motion is based on this Notice of Motion, the attached memorandum of  
25 points and authorities, the Declaration of Amy R. Lucas filed concurrently herewith,  
26 the pleadings, records, and files in this case, and such other matters that may be  
27 raised at the hearing.

28 Pursuant to Local Rule 7-3 and the instructions of the Court, this motion is

1 made following conference of counsel, including on May 28, 2024 and in  
2 subsequent communications.

3  
4 DATED: June 21, 2024

O'MELVENY & MYERS LLP

5 By: /s/ Marc J. Pensabene

6 Marc J. Pensabene

7 Attorneys for Defendant Samsung  
8 Electronics Co., Ltd.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Court should enter judgment as a matter of law (“JMOL”) in favor of  
4 Samsung because the extrinsic evidence presented at trial could lead a rational juror  
5 to only one conclusion: the parties intended Section 6.2 of the Joint Development  
6 and License Agreement (“JDLA”) to be a supply obligation limited to the parties’  
7 NVDIMM-P joint-development project. The question under New York law is what  
8 the parties intended *when they entered the contract*. And the evidence on that  
9 question was overwhelming and one-sided in Samsung’s favor. The negotiation  
10 history, term sheets, and Memorandum of Understanding (“MOU”) made  
11 unmistakably clear that Samsung’s obligation was to supply “raw materials” for the  
12 joint-development project, just as Netlist’s CEO, Chuck Hong, admitted in his  
13 capacity as Netlist’s corporate representative. That history—by far the best  
14 evidence of the parties’ intent at the time of the contract—unequivocally  
15 demonstrates Samsung’s construction of Section 6.2 is correct and alone requires  
16 judgment for Samsung.

17 The rest of the extrinsic evidence confirmed that point. When Netlist sought  
18 the approval of its Board, and when Netlist and Samsung announced the JDLA in a  
19 press release, they mentioned all the key elements in the MOU and JDLA, but did  
20 not mention any general supply obligation. Such an omission would be  
21 inconceivable if, as Netlist posits, one of the primary rights granted to Netlist was an  
22 immensely valuable general supply right. Indeed, Netlist’s SEC Form 10-K filed  
23 after the JDLA *expressly acknowledged the lack of any general supply agreement*.

24 The post-signing conduct of the parties is likewise inconsistent with Netlist  
25 having an unlimited supply right. Samsung told Netlist multiple times that the  
26 JDLA conferred no such right. In fact, after the JDLA was signed, Netlist requested  
27 a supply contract, something that would have been unnecessary if the JDLA were  
28

1 construed as Netlist argues. And ample record evidence shows that Netlist’s  
2 interpretation would be commercially unreasonable, both because it would give  
3 Netlist absolute front-of-the-line status, and because the JDLA omitted key features  
4 typical of general supply contracts. Indeed, there was evidence that such an  
5 unlimited general supply right never existed at Samsung, and there was no evidence  
6 such an agreement ever existed in the industry.

7 In contrast, Netlist proffered no evidence that, *at the time of contracting*, the  
8 parties intended Section 6.2 to be an unlimited general supply obligation. Instead,  
9 Netlist relied heavily on its witnesses’ bald, self-serving and litigation-inspired  
10 assertions of what the contract meant, in contradiction of Netlist’s Rule 30(b)(6)  
11 testimony, as well as out-of-context, long after-the-fact Samsung emails that Netlist  
12 contorted into supposed “admissions.” No reasonable juror could find that any of  
13 that “evidence” overcame the overwhelming evidence supporting Samsung’s  
14 interpretation.

15 Further, Netlist repeatedly argued (including in opening and closing) that the  
16 plain language of Section 6.2 alone resolved the case. But that argument is directly  
17 contrary to the Ninth Circuit’s holding that the contract language alone *does not*  
18 resolve the parties’ intent because Section 6.2, read in light of the contract as a  
19 whole, “is ambiguous as a matter of law” and could support either party’s reading.  
20 Thus, as a matter of law, the language of JDLA itself—let alone the language of  
21 Section 6.2 alone—cannot support the jury’s verdict. And yet, because of  
22 instructional errors, it is very likely that the jury found for Netlist based entirely on  
23 the language of Section 6.2 in isolation.

24 Even if the Court disagrees, at a minimum a new trial is required, for several  
25 independent reasons. First, even if the trial record was *sufficient* to support the  
26 jury’s verdict, the verdict was certainly contrary to the clear weight of the evidence.  
27 Second, instructional errors substantially prejudiced Samsung by allowing the jury  
28

1 to improperly find for Netlist based on the language of Section 6.2 alone. And third,  
2 Samsung’s investigation has uncovered at least one juror’s serious lack of candor  
3 during *voir dire*, raising a presumption of bias that requires a new trial.<sup>1</sup>

4 Samsung thus respectfully requests that the Court enter JMOL for Samsung  
5 or, in the alternative, vacate the jury’s verdict and order a new trial.

## 6 **II. BACKGROUND**

7 In this case, the parties advanced two competing interpretations of Section  
8 6.2. Netlist’s view was that Section 6.2 required Samsung to “fulfill all NAND and  
9 DRAM orders by Netlist for whatever purpose.” *Netlist Inc. v. Samsung Elecs. Co.,*  
10 *Ltd.*, 2023 WL 6820683, at \*1 (9th Cir. Oct. 17, 2023); *see also* Dkt. 553 at 31  
11 (Instruction No. 28) (“Netlist claims that ... Samsung agreed to supply NAND and  
12 DRAM products to Netlist without limitation to the parties’ NVDIMM-P joint  
13 development project ....”). Samsung, on the other hand, contended that Section 6.2  
14 required it to supply NAND and DRAM products only for the parties’ NVDIMM-P  
15 joint-development project. *See, e.g.*, Dkt. 553 at 31 (Instruction No. 28) (“Samsung  
16 claims that ... Samsung agreed to supply NAND and DRAM products to Netlist for  
17 the parties’ NVDIMM-P joint development project ....”).

18 Following this Court’s initial grant of partial summary judgment to Netlist,  
19 the Ninth Circuit reversed, rejected Netlist’s *expressio unius* argument, and held that  
20 Section 6.2 is “ambiguous as a matter of law,” *i.e.*, “is ambiguous as to whether  
21 Samsung’s supply obligation is limited to the now-failed joint development project  
22 ... or applies more broadly to the parties’ overall business relationship.” *Netlist*  
23 *Inc.*, 2023 WL 6820683, at \*1-2. The case was then remanded for this Court to  
24

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25 <sup>1</sup> Samsung is also concurrently moving for an evidentiary hearing on Netlist’s  
26 discovery abuses, the outcome of which may result in Samsung seeking a new trial  
27 or relief from judgment.  
28

1 consider whether the extrinsic evidence created a genuine issue of material fact. *Id.*  
2 On remand, this Court held that the extrinsic evidence was disputed, Dkt. 390 at 9,  
3 and tasked the jury with deciding which of the two meanings the parties intended,  
4 Dkt. 553 at 31 (Instruction No. 28); Dkt. 556 (Verdict Form).

### 5 **III. ARGUMENT**

#### 6 **A. Samsung Is Entitled to JMOL Because No Reasonable Juror Could** 7 **Have Concluded that the Parties Intended Netlist’s Construction** 8 **When They Entered the JDLA.**

9 Judgment as a matter of law under Rule 50(b) is proper where no “reasonable  
10 jury” could have reached the conclusion the jury in fact reached, or, in other words,  
11 where the verdict is not supported by “substantial evidence.” *E.E.O.C. v. Go Daddy*  
12 *Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009). “This standard largely ‘mirrors’  
13 the summary-judgment standard,” but “in light of the trial record rather than the  
14 discovery record.” *Dupree v. Younger*, 598 U.S. 729, 731-32 (2023).

15 When interpreting a contract under New York law, the ultimate question is  
16 the “intention of the parties at the time they entered into the contract.” *Evans v.*  
17 *Famous Music Corp.*, 1 N.Y.3d 452, 458 (2004). Netlist bore the burden of proving  
18 the parties’ intent at the time of contracting by a preponderance of the evidence. *See*  
19 *Kramer v. Greene*, 142 A.D.3d 438, 440 (N.Y. App. Div. 2016). Netlist failed to  
20 satisfy that burden.

#### 21 **1. The Evidence Overwhelmingly Supports Samsung’s** 22 **Construction**

23 All of the evidence at trial demonstrated that, at the time of contracting, the  
24 parties intended Samsung’s supply obligation under Section 6.2 to be limited to the  
25 parties’ NVDIMM-P joint-development project. Because no reasonable juror could  
26  
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1 conclude otherwise, Samsung is entitled to JMOL as to Netlist’s first (breach of  
2 contract) and third (declaratory judgment) claims for relief.<sup>2</sup>

3       **Negotiation history.** Under New York law, where a contract is ambiguous,  
4 the relevant extrinsic evidence includes “conversations, negotiations and agreements  
5 made prior to or contemporaneous with the execution” of a contract to ascertain the  
6 “intent of the parties” at the time of contracting, *67 Wall St. Co. v. Franklin Nat’l*  
7 *Bank*, 37 N.Y.2d 245, 248-49 (N.Y. 1975). Here, the negotiation history  
8 definitively shows the parties intended Samsung’s construction when they entered  
9 the JDLA.

10       For example, in June 2015, Netlist drafted two term sheets that provided  
11 Samsung would supply NAND and DRAM only as “Raw Materials” for the parties’  
12 “Technology Collaboration” or “Technology Productization.” Ex. 51  
13 [JX1129A.0001-02]<sup>3</sup> (6/9/15 term sheet); Ex. 52 [JX1037A.0002] (6/23/15 term  
14 sheet). And Netlist’s Chuck Hong conceded that the reference to “raw materials” in  
15 those term sheets “means components necessary for the NVDIMM-P product.” Ex.  
16 48 at 357:4-7 (first term sheet); *see also* Ex. 53 at 102:4-7 (second term sheet).

17       Later, in September 2015, the parties executed the MOU, “memorializ[ing]”  
18 the terms “the parties agreed on.” Ex. 48 at 364:5-10 (Chuck Hong). “Section II”  
19 of the MOU, titled “Technology Standardization and Productization,” memorialized  
20 the agreement with respect to the joint development project, including work to  
21 “standardize an NVDIMM-P\* specification” and “bring an NVDIMM-P\* product to  
22 market.” Ex. 54 [JX1111B.0001-02].

23  
24       <sup>2</sup> The Ninth Circuit already held Samsung is entitled to judgment on Netlist’s second  
25 claim (breach of JDLA Section 3).

26       <sup>3</sup> Unless otherwise noted, all “Ex.” citations refer to exhibits attached to the  
27 concurrently filed Declaration of Amy R. Lucas (“Lucas Decl.”).

1           Significantly, Section II of the MOU also contained a paragraph describing  
2 the parties' obligations to supply components for their NVDIMM-P collaboration.  
3 That paragraph first set forth Netlist's obligation to supply Samsung with  
4 NVDIMM-P controllers. *Id.* It then stated: "**Raw Materials**: Samsung will provide  
5 competitive pricing (i.e. among customers purchasing the same products and similar  
6 volumes) for the supply of Samsung NAND and DRAM." *Id.* (emphasis added).  
7 The inclusion of Samsung's supply obligation in the section devoted to the joint-  
8 development project and the use of the term "Raw Materials" make clear that it was  
9 intended to be limited to that project. Not surprisingly, Netlist's CEO and Rule  
10 30(b)(6) corporate representative regarding the JDLA negotiations and  
11 communications, Chuck Hong, expressly admitted that use of "Raw Materials" in  
12 the MOU "was in reference to the [jointly developed NVDIMM-P] product." Ex.  
13 48 at 370:17-21; *see* Ex. 76 at 5 (30(b)(6) topics); Ex. 75 (Netlist's designations).

14           The undisputed evidence also showed that the parties intended the JDLA—  
15 including Section 6.2—to adhere to the MOU. As Netlist's VP of IP & Licensing  
16 and lead JDLA negotiator, Noel Whitley, testified, the goal in finalizing the JDLA  
17 was to "document the parties' intent in the [MOU]." Ex. 48 at 508:5-6, 536:20-22.  
18 Because there is no possible dispute that **both** Netlist's **and** Samsung's supply  
19 obligations in the MOU were limited to the NVDIMM-P joint-development project,  
20 it follows that the parties intended the same limitation in the JDLA. *See also* Ex. 49  
21 at 697:24-698:15 (in finalizing the JDLA, Netlist never proposed "changing the  
22 supply agreement to [cover] NAND and DRAM products for anything other than the  
23 jointly developed product").

24           In light of this evidence, no reasonable juror could conclude that the parties'  
25 intent at the time they entered the JDLA was to create a supply obligation that was  
26 "limitless," Ex. 55 at 262:9-14 (Sasaki), or "for whatever purpose," *Netlist Inc.*,  
27 2023 WL 6820683, at \*1, as Netlist contends. That alone requires JMOL for  
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1 Samsung. *Cf. SCS Commc'ns, Inc. v. Herrick Co.*, 360 F.3d 329, 342 (2d Cir. 2004)  
2 (summary judgment appropriate where “the extrinsic evidence is so one-sided that  
3 no reasonable factfinder could decide contrary to one party’s interpretation”).

4 ***Netlist’s Contemporaneous Statements.*** Similarly, the internal and external  
5 statements Netlist made contemporaneously with the JDLA’s signing are  
6 incompatible with Netlist’s interpretation of Section 6.2. Chuck Hong testified that  
7 the “primary right” Netlist received under the JDLA was “the supply guarantee from  
8 Samsung of the NAND and DRAM products at our request,” Ex. 47 at 198:10-14,  
9 and that the purported supply right “could be incredibly valuable to Netlist’s  
10 business” “in times of worldwide shortage,” Ex. 48 at 517:22-518:8.

11 But if Netlist had truly obtained an immensely valuable, limitless supply  
12 obligation, Netlist would have showcased that, for example, to its Board of  
13 Directors when outlining the deal to secure Board approval, and to the public in the  
14 parties’ joint press release issued after closing. Yet neither Netlist’s Board  
15 presentation nor the press release included any mention of an unlimited supply.  
16 Both documents highlighted the same key points: the NVDIMM-P joint-  
17 development project, the \$8 million payment, the \$15 million loan, and the patent  
18 cross-licensing. *See* Ex. 56 [JX1147.0001] (11/6/15 draft Board agenda); Ex. 48 at  
19 384:6-385:18 (concerning Board agenda); Ex. 57 [JX1355] (11/19/15 press release);  
20 Ex. 48 at 387:6-10, 388:12-390:1 (concerning press release). Neither so much as  
21 alluded to any general supply obligation.

22 Indeed, the first SEC 10-K filed by Netlist after signing the JDLA was even  
23 more explicit. In that March 4, 2016 filing, Netlist announced the JDLA and  
24 highlighted the NVDIMM-P joint-development project and cross-license, but made  
25 no mention of an unlimited general supply obligation. Ex. 58 [JX0481.4]. To the  
26 contrary, while the 10-K paraphrased the language of Section 6.2 (*id.* at JX0481.7),  
27  
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1 *it expressly acknowledged the lack of any general supply agreement: “We have no*  
2 *long-term FPGA, DRAM or NAND flash supply contracts.” Id. at JX0481.14.*

3 No reasonable juror could conclude that the parties intended a monumentally  
4 valuable general supply obligation at the time they entered the JDLA when Netlist’s  
5 own contemporaneous statements about it made no mention of such an obligation  
6 and expressly noted the opposite.

7 ***Course of Conduct.*** Courts interpreting ambiguous contracts may also look  
8 to the parties’ course of conduct—“the practical interpretation of a contract by the  
9 parties to it for any considerable period of time before it comes to be the subject of  
10 controversy.” *Fed. Ins. Co. v. Ams. Ins. Co.*, 258 A.D.2d 39, 44 (N.Y. App. Div.  
11 1999). Unsurprisingly, the evidence shows that the parties proceeded for years after  
12 executing the JDLA as if it ***did not*** impose on Samsung an unlimited, general  
13 obligation to supply NAND and DRAM to Netlist.

14 Following execution of the JDLA, while the parties’ joint-development  
15 project proceeded on one track, their normal NAND and DRAM business  
16 transactions—which started many years before the JDLA and continued well after,  
17 *see* Ex. 80 [JX1193]; Ex. 48 at 400:6-401:22 (discussing Netlist’s pre-JDLA  
18 purchase history with Samsung)—proceeded on another, independent track. And it  
19 is undisputed that the NAND and DRAM purchases followed the same protocol  
20 throughout. Just as prior to the JDLA, Netlist would submit forecasts, Samsung  
21 would provide an allocation, Netlist would submit purchase orders, and Samsung  
22 would fulfill some but not all of Netlist’s requests. Ex. 59 at 29:7-11, 37:9-14,  
23 37:18-22, 45:2-6, 45:8-10, 47:24-48:4 (P. Hong); *see also* Ex. 49 at 624:16-625:24,  
24 627:8-18 (Knuth describing protocol before and after JDLA).

25 The undisputed evidence also shows that Samsung communicated to Netlist  
26 several times that the JDLA was not the sort of general supply contract that Netlist  
27 now posits, and *Netlist did not object, but instead asked for a supply agreement.*



1 For example, in 2016, Netlist asked Samsung to sign a letter stating that Netlist was  
2 “authorized to purchase Samsung’s full line of products” “as part of [the JDLA].”  
3 Ex. 79 [JX1056.0001] (cover email); Ex. 60 [JX1056A.0001] (Netlist’s draft letter);  
4 Ex. 48 at 491:18-21, 492:10-494:21 (Devon Park testimony about draft letter).  
5 Samsung refused to sign Netlist’s draft because Netlist’s ability to purchase  
6 products from Samsung was unrelated to the JDLA. *See* Ex. 61 [JX1482A] (signed  
7 letter omitting the JDLA); Ex. 48 at 497:22-499:9 (Devon Park testimony about  
8 final letter).

9 Similarly, in February 2017, Netlist requested that Samsung provide “Better  
10 product support and allocation” via either a “Vendor Managed Inventory”  
11 agreement or an “Official Distributor-Partner Agreement”—both of which are types  
12 of actual supply agreements. Ex. 62 [JX519A.0006, 26]; Ex. 49 at 644:18-645:22  
13 (Knuth). Netlist would not have needed better “allocation” or a new supply  
14 agreement if it already had a “limitless” supply via the JDLA. In fact, at that  
15 February 2017 meeting in Korea, Samsung informed Netlist that the JDLA was  
16 “clearly focused on Technology, and is not an avenue to support Netlist with  
17 standard products.” Ex. 62 [JX519A.0006]. Netlist never objected or disagreed.  
18 Ex. 49 at 645:23-646:8 (Knuth).<sup>4</sup>

19 None of this makes sense under Netlist’s proffered interpretation of  
20 Section 6.2. But it makes perfect sense under the parties’ actual understanding of  
21 Section 6.2 at the time of contracting, *i.e.*, as being limited to the NVDIMM-P joint-  
22 development project.

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24  
25 \_\_\_\_\_  
26 <sup>4</sup> As explained in Samsung’s concurrent motion for evidentiary hearing, Netlist  
27 withheld from discovery documents that corroborate the above and support  
28 Samsung’s construction.

1       **Commercial Reasonableness.** In determining the meaning of an ambiguous  
2 contract, courts may also look to evidence of “what would be commercially  
3 reasonable.” *Matter of MPM Silicones, L.L.C.*, 874 F.3d 787, 796-97 (2d Cir.  
4 2017). Here, the record is clear that a limitless supply obligation of the sort that  
5 Netlist posits would be well beyond the bounds of commercial reasonableness.

6       The record is replete with evidence that there are frequent shortages in the  
7 NAND and DRAM market, including in 2017, when Netlist claims Samsung  
8 breached Section 6.2. *See, e.g.*, Ex. 48 at 405:7-11. Yet, Netlist contends that  
9 Section 6.2 imposed a “limitless” supply obligation on Samsung, Ex. 55 at 262:9-14  
10 (Sasaki), and that Samsung was required to sell every chip Netlist requested, “no  
11 matter how much it affects other customers,” Ex. 59 at 283:23-284:1, 284:3-7 (P.  
12 Hong).

13       Unsurprisingly, the undisputed testimony from both Netlist and Samsung  
14 makes clear that neither company had ever entered into a supply agreement that  
15 gave one customer priority over all others, as Netlist contends Section 6.2 did. *See,*  
16 *e.g.*, Ex. 49 at 644:10-13 (Knuth testifying an unlimited supply agreement is  
17 “unheard of”); *id.* at 754:3-8 (Metz); *id.* at 690:8-12 (Ji); Ex. 55 at 273:18-21, 274:2-  
18 5 (Sasaki testifying that Netlist did not have limitless NAND and DRAM supply  
19 agreements with any other suppliers).

20       Moreover, the actual supply agreements of both Netlist and Samsung contain  
21 basic features absent from the JDLA, including typically the word “supply” in the  
22 title and/or recitals, a volume provision, and specific provisions for product  
23 forecasting. *See* Ex. 48 at 378:6-13, 379:24-382:9 (Chuck Hong discussing Ex.  
24 1486); Ex. 49 at 745:8-746:24 (Metz discussing Ex. 64 [JX1197]), 748:13-749:4  
25 (discussing Ex. 65 [JX1198]), 749:20-750:9 (discussing Ex. 66 [JX1199]), 750:21-  
26 751:9 (discussing Ex. 67 [JX1196]). Netlist did not—and could not—offer an  
27 example of any agreement that omitted all these features and simply relied on a  
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1 single sentence in a contract about something else to impose an unbounded supply  
2 obligation. In light of this undisputed evidence of how commercially reasonable  
3 supply agreements are structured, no reasonable juror could have concluded that the  
4 single, bare-bones sentence (buried in a “Supply of *Components*” section of the  
5 Joint Development and Licensing Agreement) was intended to create an  
6 extraordinary limitless supply obligation.

7                   2.     **Netlist’s Purported Evidence Was Insufficient to Support the**  
8                   **Jury’s Verdict**

9           In sharp contrast to the overwhelming evidence supporting Samsung’s  
10 construction, Netlist relied almost exclusively on evidence with little to no probative  
11 value under controlling law and the Ninth Circuit’s ruling. Stripped of that  
12 irrelevant “evidence,” the trial record contains nothing that supports Netlist’s  
13 construction, let alone rebuts the overwhelming evidence supporting Samsung’s  
14 construction.

15           ***Language of Section 6.2.*** From opening to closing, Netlist’s counsel relied  
16 heavily and repeatedly on the plain language of Section 6.2 in isolation, arguing that  
17 the provision “means exactly what it says.” *See, e.g.*, Ex. 50 at 818:3-9 (“the jury  
18 may look at this contract and say, it means exactly what it says”); Ex. 49 at 794:19-  
19 21 (similar). Indeed, in summation, Netlist’s counsel showed the jury the language  
20 of Section 6.2 and framed the question as whether the jury should “write into the  
21 agreement that the supply obligation is *limited to ... [the] NVDIMM-P joint*  
22 *development project*,” Ex. 50 at 838:24-839:2—with the emphasized words shown  
23 as handwritten inserts in the contract. Lucas Decl. ¶ 73.

24           But the Ninth Circuit’s decision foreclosed exactly the conclusion Netlist’s  
25 counsel asked the jury to draw. That opinion found Section 6.2 “*is ambiguous as a*  
26 *matter of law*,” explaining that “*[s]tanding alone*, the plain language of § 6.2 favors  
27 Netlist’s interpretation.” *Netlist Inc.*, 2023 WL 6820683, at \*2. But, Section 6.2  
28

1 **does not** stand alone, and when “[r]ead as an integrated whole ... the contract’s  
2 apparent purpose as derived from its title, structure, and related provisions make  
3 § 6.2 reasonably susceptible of more than one interpretation.” *Id.* at \*1 (citation  
4 omitted). In other words, it would be legally improper to find for Netlist based on  
5 Section 6.2’s language alone.

6 The problem presented by Netlist’s arguments would have been solved by a  
7 jury charge warning the jury away from the “plain language” analysis Netlist’s  
8 counsel pressed. But the Court’s instructions failed to do so, instead affirmatively  
9 (and erroneously) inviting the jury to do just that. This is reflected in at least two  
10 legally erroneous aspects of the instructions: (i) charging that the “best evidence” of  
11 the parties’ intent was the language in the agreement, without even explaining the  
12 agreement should be considered as a whole; and (ii) further instructing that the jury  
13 was permitted, **but not required**, to (*i.e.*, “may”) rely on extrinsic evidence in  
14 determining the parties’ intent, and failing to even identify the types of extrinsic  
15 evidence relevant to such an analysis. *See* Ex. 50 at 816:2-822:22.

16 Written contract as “best evidence” of the parties’ intent. This aspect of the  
17 Court’s charge was legally erroneous because the written contract is, by definition,  
18 **not** the “best evidence” of parties’ intent if the contract is “ambiguous as a matter of  
19 law,” as the Ninth Circuit held here. *Netlist Inc.*, 2023 WL 6820683, at \*1-2. Under  
20 New York law, “[w]hen a court has determined that a contract is ambiguous, it has  
21 determined that the ‘best evidence’ of the parties’ intent—the parties’ words as  
22 memorialized in the agreement—**failed to indicate the parties’ intent**,” *Catlin*  
23 *Speciality Ins. Co. v. QA3 Fin. Corp.*, 36 F. Supp. 3d 336, 341-42 (S.D.N.Y. 2014)  
24 (emphasis added), which means that the factfinder **must** look beyond the written  
25 words to determine the parties’ intent. That is why, after concluding that the JDLA  
26 was “reasonably susceptible of more than one interpretation,” *Netlist Inc.*, 2023 WL  
27 6820683, at \*1 (quotation omitted), the Ninth Circuit remanded solely for this Court  
28

1 to consider the *extrinsic evidence*. *Id.* at \*2. The Ninth Circuit’s principal holding  
2 was that the intrinsic evidence—*i.e.*, the “written contract”—did not resolve the  
3 parties’ intent, which means that the written contract *was not* the best evidence of  
4 the parties’ intent.

5 The Court explained that it would give the “best evidence” instruction  
6 “because it’s in the pattern instruction.” Ex. 50 at 822:17-18. But that language  
7 appears not in the pattern instruction—there is no New York pattern instruction  
8 about ambiguous contracts—but in the lengthy caselaw appendix to the pattern  
9 instruction. *See* N.Y. Pattern Jury Instr.—Civil 4:1 (Contracts—Elements).  
10 Moreover, every case cited in the appendix for the “best evidence” proposition  
11 involves construction of an *unambiguous* contract. *See Tomhannock, LLC v.*  
12 *Roustabout Res., LLC*, 33 N.Y.3d 1080, 1082 (2019) (construing unambiguous  
13 contract as matter of law); *Marin v. Const. Realty, LLC*, 28 N.Y.3d 666, 673-74  
14 (2017) (same); *Schron v. Troutman Sanders LLP*, 20 N.Y.3d 430, 436-47 (2013)  
15 (same); *Goldman v. White Plains Ctr. for Nursing Care, LLC*, 11 N.Y.3d 173, 176-  
16 77 (2008) (same).

17 It is, of course, true that in the run-of-the-mill case where the contract is  
18 unambiguous, the written contract represents the “best evidence” of the parties’  
19 intent—that is why courts may not consider extrinsic evidence in such cases. But  
20 that is obviously not true when the contract is ambiguous—in that case, the written  
21 contract does not resolve the question one way or the other. The Court’s instruction  
22 that nevertheless told the jury the written contract was the “best evidence” of the  
23 parties’ intent in the context of an ambiguous contract was legally erroneous and  
24 allowed—indeed, encouraged—the jury to treat Section 6.2’s language as having  
25 definitively resolved the question.

26 The Court’s erroneous “best evidence” instruction made it even more  
27 important that the jury be instructed to construe Section 6.2, not in isolation, but in  
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1 the context of the JDLA as a whole, as Samsung requested. Ex. 50 at 821:13-17;  
2 *see Netlist Inc.*, 2023 WL 6820683, at \*1 (“[I]n determining the parties’ intent as to  
3 a particular provision, New York courts read ‘the entirety of the agreement in the  
4 context of the parties’ relationship and circumstances,’ rather than isolating distinct  
5 provisions of the agreement.”). But the instructions failed to tell the jury even that.  
6 Jury “may” consider extrinsic evidence. The Court exacerbated the error by  
7 telling the jury that it **may** consider extrinsic evidence to determine the parties’  
8 intent, when the law is clear that such evidence, if offered, **must** be considered in the  
9 context of an ambiguous contract. *See, e.g., Sutton v. E. River Sav. Bank*, 55 N.Y.2d  
10 550, 554 (1982) (jury’s role is to “clear up the ambiguity by passing on the  
11 credibility of the extrinsic evidence and whatever inferences reasonably could be  
12 drawn therefrom”); *Ezrasons, Inc. v. Travelers Indem. Co.*, 89 F.4th 388, 399-400  
13 (2d Cir. 2023) (“When a contract is ambiguous, we **must** determine whether  
14 extrinsic evidence provided by the parties can resolve the ambiguity.”) (emphasis  
15 added); *A.J. Temple Marble & Tile, Inc. v. Long Island Rail Rd.*, 256 A.D.2d 527,  
16 528 (N.Y. App. Div. 1998) (“Thus, the contract is ambiguous ... and the Supreme  
17 Court **must** rely on extrinsic evidence to discern the intent of the parties.”)  
18 (emphasis added); *Robinson v. Transworld Sys., Inc.*, 876 F. Supp. 385, 390  
19 (N.D.N.Y. 1995) (“However, if the language is ambiguous, the court **must** consider  
20 extrinsic evidence.”) (emphasis added). The instruction was also inconsistent with  
21 the Ninth Circuit’s opinion and mandate, which remanded **solely** for the  
22 consideration of “the extrinsic evidence.” *Netlist Inc.*, 2023 WL 6820683, at \*2.  
23 The Court further exacerbated this error by failing to instruct the jury about the  
24 types of extrinsic evidence relevant under New York law to guide evaluation of the  
25 parties’ intent. Ex. 50 at 820:24-821:3.

26 Those instructional errors require a new trial. *See infra* Section III.B.2. But  
27 they are also important to the JMOL analysis because they offer a likely explanation  
28



1 for why the jury found for Netlist despite the lack of any relevant extrinsic evidence  
2 supporting Netlist’s interpretation—the instructions created an overwhelming risk  
3 that the jury would follow Netlist’s counsel’s improper request and find against  
4 Samsung based entirely on the language of Section 6.2 in isolation.

5 ***Chuck Hong’s Trial Testimony.*** Chuck Hong attempted at trial to contradict  
6 his Rule 30(b)(6) deposition admissions that “raw materials” under the MOU and  
7 predecessor term sheets was limited to the joint-development project. *See* Ex. 48 at  
8 355:11-16, 363:1-5, 369:19-23. But Chuck Hong testified as Netlist’s Rule 30(b)(6)  
9 corporate representative regarding the JDLA negotiations and communications, Ex.  
10 76 at 5; Ex. 75, and Netlist is bound by that testimony. *Snapp v. United Transp.*  
11 *Union*, 889 F.3d 1088, 1103 (9th Cir. 2018) (a corporation “cannot present a theory  
12 of the facts that differs from that articulated by the designated Rule 30(b)(6)  
13 representative”).

14 Chuck Hong also relied heavily on a single piece of pre-JDLA evidence of the  
15 parties’ intent—a May 2015 Samsung term sheet that specified Samsung would  
16 supply “NAND, DRAM, and/or NVDIMM-P controllers on terms to be negotiated.”  
17 Ex. 68 [JX0102.1]; *see also, e.g.*, Ex. 47 at 243:3-244:12 (Chuck Hong testimony  
18 about May 2015 term sheet). Netlist further pointed to an email accompanying that  
19 term sheet in which a Samsung employee stated that he hoped the supply would  
20 “help enable [Netlist’s] vision of being a products company.” Ex. 69 [JX0101.1].  
21 But the term sheet merely stated that the parties would later negotiate a supply  
22 provision, and the email acknowledged that a supply obligation would help Netlist  
23 develop the NVDIMM-P product. Ex. 49 at 692:15-21. None of that suggests any  
24 intent to create an unlimited general supply obligation as opposed to a supply  
25 obligation for the NVDIMM-P collaboration. And what matters is the parties’ intent  
26 at the time of contracting—and the record is clear that, from June 2015 until signing,  
27 the negotiations, including the later term sheets and MOU, reflected a clear intent to  
28

1 limit the supply to “raw materials” for the NVDIMM-P joint-development project,  
2 consistent with Samsung’s construction.

3       **Netlist’s Purported Complaints to Samsung.** Netlist pointed to several  
4 instances in which it claims it informed Samsung that Samsung was in breach of  
5 Section 6.2 prior to the May 2020 notice letter. *See, e.g.*, Ex. 70 [JX152] (February  
6 2018 email from P. Hong); Ex. 71 [JX119] (June 2017 presentation). But none of  
7 those communications actually asserted a contractual right to purchase any quantity  
8 of NAND and DRAM. And even if they did, those unilateral communications—  
9 *years after* the contract was signed—cannot establish that the parties intended a  
10 general supply obligation at the time of contracting, particularly because there is no  
11 evidence that Samsung ever acquiesced to Netlist’s claims. *See Cont’l Cas. Co. v.*  
12 *Rapid-Am. Corp.*, 80 N.Y.2d 640, 651 (1993) (“[T]o show a practical construction  
13 ... there must have been conduct by the one party expressly or inferentially claiming  
14 as of right under the doubtful provision, *coupled with knowledge thereof and*  
15 *acquiescence therein, express or implied, by the other.*” (emphasis added)); *Murray*  
16 *Walter, Inc. v. Sarkisian Bros., Inc.*, 183 A.D.2d 140, 146 (N.Y. App. Div. 1992)  
17 (declining to consider communication “well after contract formation”).

18       **Post-JDLA Samsung Internal Emails.** Finally, Netlist pointed to several  
19 internal Samsung emails it contended were admissions that Section 6.2 was not  
20 limited to the NVDIMM-P joint-development project. *See* Ex. 50 at 836:14-19  
21 (citing Ex. 72 [JX131] and misleadingly telling the jury that this 2018 email  
22 represented “what ... folks [thought] at the time this agreement was signed” in  
23 2015), 842:2-7 (citing Ex. 73 [JX35], November 2016 email), 869:4-8 (citing Ex. 74  
24 [JX132], February 2018 email chain).

25       To start, these one-off, unrelated internal emails are not probative of the  
26 parties’ intent at the time of contracting because they are temporally removed from  
27 that crucial period. *See, e.g., LaSalle Bank Nat’l Ass’n v. Nomura Asset Cap. Corp.*,



1 424 F.3d 195, 207 n.10 (2d Cir. 2005) (“[I]t is not clear ... that the extrinsic  
2 evidence on which the court relied ... was ... relevant to the determination of the  
3 parties’ intent at the time they entered into the [contract], nearly three years  
4 earlier.”); *Murray Walter*, 183 A.D.2d at 146 (declining to consider even *external*  
5 communication sent “well after contract formation”). Additionally, those “unilateral  
6 expression[s] of one party’s postcontractual subjective understanding of the terms of  
7 [an] agreement” are “not probative as an aid to the interpretation of the contract.”  
8 *Faulkner v. Nat’l Geographic Soc’y*, 452 F. Supp. 2d 369, 379 (S.D.N.Y. 2006);  
9 *Murray Walter*, 183 A.D.2d at 146.

10       Regardless, none of the emails supports Netlist’s construction for other  
11 reasons. The first email merely pastes a screenshot of Section 6.2 and states,  
12 “Pursuant to the agreement, supply for NAND and DRAM products is necessary if  
13 there is a request from Netlist.” Ex. 72 [JX131]. But this is just a paraphrase of  
14 Section 6.2 and does not address the scope of the supply obligation. As the Ninth  
15 Circuit made clear, the language of Section 6.2 alone cannot resolve the question of  
16 scope. *See Netlist Inc.*, 2023 WL 6820683, at \*2. The same is true of the third  
17 email, which merely states that “there is an obligation to supply NAND/DRAM at a  
18 competitive price.” Ex. 74 [JX0132.1]. Moreover, the second and third emails were  
19 sent by Samsung employees who had no basis to know whether the scope of  
20 Samsung’s supply obligation was broad or limited: Indong Kim, author of the  
21 second email, was involved with joint development, not sales, Ex. 49 at 727:16-18,  
22 and Netlist introduced no evidence about the responsibilities of Yong Hwangbo,  
23 author of the third email. Additionally, the subject of the second email was the  
24 letter that Netlist requested in 2016 stating that it was authorized to purchase  
25 Samsung’s products and, as discussed above, Samsung refused to sign any version  
26 of the letter suggesting that the JDLA had anything to do with Netlist’s authority to  
27 purchase NAND and DRAM from Samsung generally. *See supra* at 8-9. None of  
28

1 these emails supports Netlist’s contention that, at the time of contracting, the parties  
2 intended Section 6.2 to require Samsung to supply products to Netlist outside of the  
3 joint-development project.

4 **B. At a Minimum, a New Trial Is Required**

5 At minimum, the Court must vacate the jury’s verdict and grant a new trial.  
6 Under Rule 59, a new trial is appropriate “for any reason for which a new trial has  
7 heretofore been granted in an action at law in federal court.” Fed. R. Civ. P.  
8 59(a)(1)(A); *see also* Fed. R. Civ. P. 50(b)(2). It is the “*duty*” of the trial judge to  
9 “set aside the verdict ... to prevent ... a miscarriage of justice.” *Murphy v. City of*  
10 *Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990) (quotations omitted) (emphasis  
11 added). A new trial must be granted if: (i) the verdict is against the clear weight of  
12 the evidence; (ii) an erroneous jury instruction is given and the error is not harmless;  
13 or (iii) a juror was biased. While any one of those grounds would require a new  
14 trial, here, all three are present.

15 **1. Clear Weight of the Evidence**

16 The district court must order a new trial if the jury’s verdict is “contrary to the  
17 clear weight of the evidence.” *Murphy*, 914 F.2d at 187; *accord Doherty v. State*  
18 *Farm Gen. Ins. Co.*, 2022 WL 2230123, at \*2 (C.D. Cal. Jan. 11, 2022) (Scarsi, J.).  
19 Unlike a motion for JMOL, a motion for a new trial requires the Court to “to weigh  
20 the evidence as [the Court] saw it.” *Murphy*, 914 F.2d at 187. The judge may  
21 “assess the credibility of witnesses” and may set aside the verdict even where the  
22 verdict is supported by substantial evidence. *Landes Constr. Co. v. Royal Bank of*  
23 *Can.*, 833 F.2d 1365, 1371 (9th Cir. 1987). The Court should exercise its discretion  
24 to grant a new trial on this basis if, “having given full respect to the jury’s findings,  
25 the judge on the entire evidence is left with the definite and firm conviction that a  
26 mistake has been committed.” *Id.* at 1371-72 (quotations omitted).

1 Here, the jury’s verdict on the intended meaning of Section 6.2 is contrary to  
2 the clear weight of the evidence for the reasons explained above. *See supra* Section  
3 III.A. Even if the evidence does not require judgment for Samsung, it  
4 overwhelmingly weighed in Samsung’s favor and warrants a new trial.

## 5 2. Instructional Errors

6 “[E]rroneous jury instructions, as well as the failure to give adequate  
7 instructions, are also bases for a new trial.” *Murphy*, 914 F.2d at 187. “Jury  
8 instructions must ... fairly and adequately cover the issues presented, correctly state  
9 the law, and not be misleading.” *Spencer v. Peters*, 857 F.3d 789, 797 (9th Cir.  
10 2017). A district court must grant a new trial based on erroneous jury instructions  
11 unless the error is harmless. *See Frost v. BNSF Ry. Co.*, 914 F.3d 1189, 1198 (9th  
12 Cir. 2019) (erroneous instruction requires new trial unless non-moving party shows  
13 “it is more probable than not that the jury would have reached the same verdict”  
14 absent the error).

15 As explained *supra*, Section III.A.2, the Court’s instructions were inconsistent  
16 with the Ninth Circuit’s decision and New York law in multiple respects, and  
17 improperly allowed the jury to rely on the language of Section 6.2 in isolation to  
18 find for Netlist. And the error was undoubtedly prejudicial because that is exactly  
19 what Netlist asked the jury to do. Netlist’s counsel expressly and repeatedly asked  
20 the jury to find for Netlist based entirely on the language of Section 6.2 in isolation,  
21 *see, e.g.*, Ex. 50 at 838:24-839:2, 840:19-23—a result the Court’s instructions should  
22 have foreclosed but instead invited.

## 23 3. Juror False Representations During *Voir Dire*

24 Finally, a new trial is required because of false representations by jurors  
25 during *voir dire* that concealed material facts.

26 “The presence of a biased juror cannot be harmless; the error **requires** a new  
27 trial without a showing of actual prejudice.” *Dyer v. Calderon*, 151 F.3d 970, 973  
28

1 n.2 (9th Cir. 1998) (en banc) (emphasis added). A party may obtain a new trial by  
2 showing either “*actual* or *implied*” bias on the part of any single juror—that is,  
3 “bias in fact or bias conclusively presumed as a matter of law.” *United States v.*  
4 *Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000) (quotations omitted). Any “[d]oubts  
5 regarding bias must be resolved against the juror.” *Id.* at 1114 (quotations omitted).

6 Bias is presumed where a juror “lies in order to secure a seat on the jury.”  
7 *Dyer*, 151 F.3d at 983; *see also Green v. White*, 232 F.3d 671, 677 & n.7 (9th Cir.  
8 2000). That is so because a juror who “lies materially and repeatedly in response to  
9 legitimate inquiries about her background introduces destructive uncertainties into  
10 the process,” even in the absence of actual bias. *Dyer*, 151 F.3d at 983. Such a  
11 juror “can be expected to treat her responsibilities as a juror ... with ... scorn,” and  
12 “may believe that the witnesses also feel no obligation to tell the truth and decide  
13 the case based on her prejudices rather than the testimony.” *Id.*

14 The presumption of bias is all the more compelling where a juror deliberately  
15 conceals her own litigation history or personal connection to legal issues relevant to  
16 the trial. *See, e.g., United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir. 1979) (new  
17 trial required where juror in heroin-related prosecution concealed that he had two  
18 sons in prison for heroin-related offenses); *United States v. Perkins*, 748 F.2d 1519,  
19 1522-23 (11th Cir. 1984) (new trial required where juror falsely represented in *voir*  
20 *dire* he had not been involved in prior litigation, because juror’s “dishonesty, in and  
21 of itself, [was] a strong indication” of bias and juror’s “involvement in prior similar  
22 litigation” created “additional inference of bias”).<sup>5</sup>

23  
24 <sup>5</sup> State courts have reached similar conclusions. *E.g., Johnson v. McCullough*, 306  
25 S.W.3d 551, 558 (Mo. 2010) (new trial required, and bias and prejudice presumed,  
26 where juror intentionally concealed litigation history in *voir dire*); *Perl v. K-Mart*  
27 *Corp.*, 493 So. 2d 542, 543 (Fla. Dist. Ct. App. 1986) (remanding for new trial  
28 where juror failed to disclose involvement in previous lawsuits).

1 Here, four of the 16 jurors (3, 12, 13, and 16) questioned during *voir dire*  
2 (three of the eight empaneled—Jurors 3, 12, and 16) failed to disclose prior  
3 litigations, with the failure by one juror—Juror 16—being decidedly serious. Lucas  
4 Decl. ¶¶ 2-41. Juror 16 did not raise her hand when asked during *voir dire* whether  
5 a lawsuit had ever been filed against her, or whether she had ever filed a lawsuit  
6 herself. Ex. 1 at 51:16-21. Nor did she raise her hand when asked whether she had  
7 ever been involved in a contract dispute. *Id.* at 51:2-15. Yet investigation has  
8 revealed that Juror 16’s representations on these questions were false, [REDACTED]

9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]

7 These are not the sorts of minor lies that *Dyer* explained might be  
8 “immaterial to the fairness of [a] trial,” like a juror “fail[ing] to mention a magazine  
9 he subscribes to” or “exaggerat[ing] the importance of his job.” *Dyer*, 151 F.3d at  
10 984. [REDACTED]

11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED] Juror 16 must have known that disclosing those and the numerous other  
14 lawsuits would have materially impacted her chances of serving on the jury. In  
15 these circumstances, as in *Dyer*, the Court must infer that she “lied in order to  
16 preserve her status as a juror,” giving rise to a conclusive presumption of bias. *Id.* at  
17 982.

18 At a minimum, Juror 16’s lies deprived Samsung and the Court of an  
19 opportunity to explore her litigation history to uncover any actual or implied bias. A  
20 new trial is plainly required.

21  
22  
23  
24  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]

1 **IV. CONCLUSION**

2 For the foregoing reasons, Samsung respectfully requests that the Court enter  
3 JMOL for Samsung pursuant to Rule 50(b) or, in the alternative, vacate the jury's  
4 verdict and order a new trial pursuant to Rule 59.

5  
6 DATED: June 21, 2024

O'MELVENY & MYERS LLP

7  
8 By: /s/ Marc J. Pensabene

Marc J. Pensabene

9 Attorneys for Defendant Samsung  
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**CERTIFICATE OF COMPLIANCE**

The undersigned, counsel of record for Samsung Electronics Co., Ltd.,  
certifies that this brief contains 6,988 words, which complies with the word limit of  
Local Rule 11-6.1.

DATED: June 21, 2024

By: /s/ Marc. J. Pensabene

Marc J. Pensabene